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Supreme Court, U.S.
FILED
07-249 AUG 17 2007
OFFICE OF THE CLERK

No. _____

IN THE

# Supreme Court of the United States

ANDI PALGUNADI,
*Petitioner,*

v.

ALBERTO R. GONZALES,
UNITED STATES ATTORNEY GENERAL
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. When, during the pendency of the alien-petitioner's appeal to the US Court of Appeals, the I-140 Petition for Alien Worker filed on his behalf is approved and his employment visa becomes current and available thereby making him eligible to adjust status under Section 245 (i) of the Immigration and Nationality Act, may the US Court of Appeals validly deny petitioner's Motion to Remand the case back to the Immigration Court which is the only venue where he can apply for adjustment of status, or is the denial thereof tantamount to a violation of petitioner's due process rights and the clear ameliorative intent of INA § 245(i) to grant otherwise ineligible aliens the opportunity to adjust.

2. Whether or not petitioner's evidence rises to the level of past persecution and hence, should have been considered in proving his eligibility for withholding of removal notwithstanding that his application for asylum is barred under the one year bar rule.

## CORPORATE DISCLOSURE STATEMENT

None of the parties are corporations. Sup. Ct. R. 29.6.

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## PETITION FOR A WRIT OF CERTIORARI

Andi Palgunadi ("petitioner" hereafter) prays that this Court reviews on certiorari the judgment of the United States Court of Appeals, for the Fourth Circuit, (hereinafter referred as the "US Court of Appeals") which dismissed the appeal of the petitioner from the judgment of the Board of Immigration Appeals ("BIA") affirming the decision of the Immigration Court (IC).

## DECISION BELOW

The unpublished per curiam opinion of the United States Court of Appeals dismissing the Petition for Review is set forth in the Appendix at 1a to 2a. and its Order denying the Petition for Rehearing at Appendix 3a.

## JURISDICTION

The judgment of the United States Court of Appeals dismissing the Petition for Review of petitioner was entered on February 12, 2007; and its Order denying the Petition for Rehearing was entered on May 22, 2007. This Court has jurisdiction under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the US Constitution provides that: "No person shall be ... deprived of life, liberty, or property, without due process of law."

## STATUTES AND REGULATIONS INVOLVED

Pursuant to this Court's Rule 14.1(f), the pertinent provisions of the following laws and regulations are set forth at Appendix 4a to 6a:

1. Sections 245 (i) and 240(c)(7) of the Immigration and Nationality Act (INA);

2. Title 28 Section 2347 of the United States Code; and

3. Title 8 Sections 245.2 and 1003.2(c)(2) of the Code of Federal Regulations.

## STATEMENT OF THE CASE

Petitioner is a native and citizen of Indonesia who came to the United States (U.S.) on November 1, 1999 as a nonimmigrant vocational/non-academic student with authority to stay until October 31, 2000. Petitioner, who is married and has two children, continued to stay in the US past his authorized period of stay.

Thereafter, the Legal Immigration Family Equity (LIFE) Act was enacted, amending and extending the provisions of INA § 245(i).

Shortly thereafter, on April 30, 2001, a labor certification application was filed on petitioner's behalf by Matt Meg Exxon.

On April 25, 2003, the Immigration and Naturalization Service (INS) issued a Notice to Appear (NTA) and placed petitioner in Removal Proceedings on the ground that he has remained in the U.S. beyond October 31, 2000 without authorization.

He conceded to the charge of removability as alleged in the NTA, but sought the relief of asylum, withholding of removal and relief under Article III of the UN Convention Against Torture ("CAT").

All of petitioner's applications for relief were denied in the January 31, 2005, decision of the IC.

On March 1, 2005, the petitioner timely appealed the IC decision to the BIA.

On July 18, 2005, during the pendency of his appeal with the BIA, the labor certification application filed on petitioner's behalf by Matt Meg Exxon was approved with the

issuance of a Final Determination by the Department of Labor.

Petitioner filed a motion with the BIA to remand the case to the IC for consideration of adjustment of status pursuant to 8 CFR §§245.2(a) (2) (i)(C)(3) and 1245.2(a)(2)(i)(C)(3) as a superior relief from removal, because petitoner's priority date has become current and he has a pending I-140 petition.

However, in its Decision of May 15, 2006, the BIA denied the Motion to Remand on the ground that the said employment-based visa has yet to be adjudicated and the BIA declines to remand cases on the basis of an unadjudicated work visa. The BIA also affirmed the IC's order denying petitioner's application for asylum, withholding of removal and protection under the CAT.

On June 12, 2006, petitioner timely brought on a petition for review with the US Court of Appeals the decision of the BIA. Meantime, a stay of removal was granted by the US Court of Appeals on July 26, 2006.

On November 20, 2006, during the pendency of his appeal with the US Court of Appeals, the I-140 Immigrant Petition for Alien Worker for petitioner was approved by the INS, and shortly thereafter, became current and visa immediately available as per the December 2006 INS visa bulletin.

Thus, petitioner filed on November 29, 2006, with the US Court of Appeals a Motion to Remand Case to the IC for Consideration of Adjustment of Status alleging that:

1) Petitioner is a direct beneficiary of an I-140 Immigrant Petition for Alien Worker filed on his behalf by Matt Meg Exxon which was approved on November 20, 2006;

2) The April 30, 2001 priority date for the approved I-140 is current and visa immediately available because the Department of State is now processing August 1, 2002 for the 3$^{Rd}$ Category of Employment Based petition as per the

Department of State Visa Bulletin for December 2006 which he submitted as an Exhibit;

3) He is submitting his application for Adjustment of Status as a superior relief from removal under INA § 245(i); and

4) The adjustment of status was not available to the respondent at the former hearing and proceedings against him, and is material and relevant to his case as a relief from removal.

Petitioner attached to the said Motion to Remand, and submitted for filing his I-485 Application for Adjustment of Status packet together with proof of payment of the required fees.

The government filed an Opposition to the Motion to Remand on the grounds that: 1) As a fundamental principle of federal jurisprudence, the US Court of Appeals lacks jurisdiction to grant the relief requested citing 8 U.S.C § 1252(b)(4)(A) that the Court of Appeals shall decide the petition only on the administrative record on which the order is based and 8 U.S.C. § 1252(f)(2) that notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this subsection unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law; and 2) that the appropriate recourse for petitioner is to make an application to the administrative agency, the BIA, through a Motion to Reopen. However, the government contended, under 8 C.F.R. § 1003.2(c)(2) which prescribes the number of such applications and the period in which they must be made, petitioner is foreclosed from seeking relief in the BIA.

Petitioner filed a Reply to the government's opposition alleging that: 1) The US Court of Appeals has jurisdiction to remand the case and hold in abeyance the disposition thereof

under its power of judicial review to protect petitioner's rights under the due process clause of the Fifth Amendment to the US Constitution; 2) petitioner is seeking the mantle of judicial protection of this court to present a superior relief from removal (adjustment of status under INA § 245(i)) which is material, relevant and was unavailable or incapable of proof during prior proceedings; and 3) the INS right to contest the merits of petitioner's application for adjustment of status is not being curtailed and waived because it may still contest the merits of respondent's case in a reopened proceeding.

In its decision rendered on February 12, 2007, the US Court of Appeals denied the Petition for Review of the BIA decision denying his applications for asylum, withholding of Removal and CAT. It also denied petitioner's Motion to Remand without stating the grounds for denial.

Petitioner filed a timely Petition for Rehearing on March 13, 2007 which was denied in the May 22, 2007 Order of the US Court of Appeals.

Hence this petition.

## REASONS FOR GRANTING THE WRIT

**1. The US Court of Appeals has decided, in a manner that conflicts with the constitution, law and relevant decisions of this Court, an important question of federal law that has not been, and should be settled by this Court.**

Under INA § 245(i) aliens who are physically present in the US who are the beneficiaries of a petition filed before April 30, 2001, and who pay a $1000 fee, may apply for adjustment of status and the Attorney General may grant the adjustment of status if, the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and an immigrant visa is immediately available to the alien at the time the application is filed.

Petitioner entered on November 1, 1999, has an approved labor certification application filed on April 30, 2001 and an approved I-140 Immigrant Petition for Alien Worker which is now current and visa immediately available. He is an alien qualified to adjust under INA § 245(i).

That petitioner's I-140 was approved and visa became current and immediately available only when his case was on appeal with the US Court of Appeals should not disqualify petitioner from adjusting because the law does not provide a time frame when the visa should become current and available, or disqualify aliens whose removal proceedings are pending before the US Court of Appeals.

When Congress has wanted to impose special restrictions on the applications for certain categories of aliens that it has deemed eligible, or conversely to open up eligibility for aliens that were ineligible, it has done so explicitly. *Succar vs Ashcroft*, 394 F. 3d 8 (1st Cir. 2005).

Moreover, the law has a clear ameliorative intent:

> "The statutory terms of INA § 245(i) clearly extend adjustment of status to aliens living in this country without legal status. This provision of the statute was originally enacted in 1994 in order to allow individuals who would qualify for adjustment of status but for their unlawful immigration status to apply for adjustment from within this country, rather than forcing them to undertake the time, cost, and risk of leaving the country in order to apply. The amendment was extended in 1997 and again in 2000, in order to allow 'spouses, children, parents and siblings of permanent residents or U.S. citizens [to] be able to adjust their status in the U.S. and avoid needless separation from their loved ones.' See Joint Memorandum, Statement of Senator Kennedy, 146 Cong. Rec. S11850-52 (daily ed. Dec. 15, 2000). Nothing in the statutory provisions regarding adjustment of status, nor in the discussion of its purposes, suggests

that aliens who have been previously deported or removed are barred from this form of relief." *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, (9th Cir. 2004)

If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

As it is, by denying his motion to remand to the IC, petitioner was left without any venue where his adjustment of status could be heard because under 8 CFR § 245.2 the application for adjustment of status of an alien in removal, may only be considered in the removal proceedings, and as pointed out by the government in its Opposition to petitioner's Motion for Remand in the US Court of Appeals, petitioner is foreclosed from seeking relief in the BIA because the period for filing a Motion to Reopen has lapsed under 8 C.F.R. § 1003.2(c)(2) and also INA § 240(c)(7).

Under the Constitution no person may be deprived of life, liberty or property without due process of law. The fundamental protections of the Fifth Amendment are universal in their application, to all persons within the territorial jurisdiction of the United States. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Once an alien enters the country, the legal circumstances change, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. *Zadvydas v. Davis*, 533 U.S. 678, (2001); *Yamataya v. Fisher*, 189 U.S. 86 (1903).

Procedural due process requires the government to afford a meaningful hearing and judicial review if it seeks to deprive a person of a liberty or property interest. The Supreme Court has recognized that deportation touches on important liberty issues and that aliens must be accorded due process. The Supreme Court has held that doubts are resolved in favor of the alien because deportation is a drastic measure and at times

the equivalent of banishment or exile. *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948); *Rosenberg v. Fleuti*, 374 U.S. 449 (1962); *Matthews v. Eldridge*, 424 U.S. 319.

To be sure, the Attorney General retains discretion to decide whether petitioner will ultimately receive a status adjustment. An alien who satisfies the eligibility requirements to apply "does not have a right to the relief," but he is "eligible" to apply for it. *Succar vs Ashcroft*, 394 F. 3d 8 (1st Cir. 2005). In considering whether to exercise his discretion with respect to a particular application to adjust status, the Attorney General conducts an individualized determination, looking at such factors as family ties, hardship, and length of residence in the United States. *Elkins v.Moreno*, 435 U.S. 647 (1978). Considering that the law confers upon petitioner the right to apply for adjustment, he cannot be deprived thereof without running afoul of the due process clause of the constitution. The case must be remanded so petitioner is provided the opportunity to be heard by the agency upon whom the discretion to deny or to grant has been vested by law.

Removal proceedings is the sole procedure for determining whether an alien is inadmissible, deportable, or eligible for relief from removal. Removal proceedings generally require an Immigration Judge to make two findings: (1) a determination of the alien's removability from the United States, and (2) thereafter deciding whether the alien is eligible for a form of relief from removal. Adjustment of Status is a form of relief from removal.

Because his I-140 Immigrant Petition was approved and visa became current and available only during the pendency of his appeal with the US Court of Appeals, it was impossible for petitioner to raise the defense of adjustment of status before the IC and the BIA. No hearing had thus been held on this particular relief available to petitioner. Consequently, whether under 28 USC § 2347 (c) or § 2347 (b), remand

may properly be done. In view of the arguments set forth above, it was manifest error for the US Court of Appeals not to have done so.

**2. The failure to consider that petitioner's evidence rises to the level of past persecution calls for the exercise of this Court'' supervisory power.**

Petitioner in his testimony recited in detail the threats to his life and violence upon his person and his family in Indonesia carried out by the extremist and fanatical Jemaat Islamiah, a terrorist group under the watchlist of the US government, because of his membership in a group of government pilots and the Muhamadiyah Muslim Religious Sect a moderate Islam faith.

The evidence petitioner adduced includes a bomb threat on his aircraft, the burning of his aircraft, the robbing of their store, extortion and injuries suffered in the hands of members of the said group. In testifying about these incidents, petitioner was credible and consistent throughout. The testimony of the applicant if credible may be sufficient to sustain proof.

Petitioner's claim rises to the level of past persecution. Consequently, the burden shifted to the INS to show, by a preponderance of the evidence that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution.The Service raised no objections to petitioner's testimony in open court and has not introduced any evidence to contradict the Respondent's claim or to suggest it is impossible. Unrebutted, the presumption stands.

Petitioner's evidence of past persecution was swept under the one year bar rule. But even if he is barred under the rule from seeking asylum, the same should nonetheless have been considered in his application for withholding of removal. In cases in which the applicant has established past

persecution, the burden of establishing that petitioner is not eligible for withholding of removal is shifted on the government. Since petitioner's evidence of past persecution stands unrebutted by the government, petitioner must be deemed to have fully established his eligibility for withholding of removal.

Under these circumstances, and in accordance with the United Nations Convention and Protocol relating to the Status of Refugees to afford a generous standard for protection in cases of doubt, petitioner should be granted the relief of withholding of removal.

## CONCLUSION

WHEREFORE, it is respectfully prayed of the Honorable Court to grant the petition for a writ of certiorari.

Respectfully Submitted:

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# APPENDIX

**UNPUBLISHED**

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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ANDI PALGUNADI,
*Petitioner,*

v.

ALBERTO GONZALES
Attorney General,
*Respondent,*

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No. 06-1666

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On Petition for Review of an Order of the
Board of Immigration Appeals
(A72-167-695)

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Submitted: January 31, 2007

Decided: February 12, 2007

Before MICHEL, GREGORY, and DUNCAN,
Circuit Judges.

PER CURIAM:

Andi Palgunadi, a native and citizen of Indonesia, petitions for review of an order of the Board of Immigration Appeals adopting and affirming the Immigration Judge's (IJ) order denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture. Palgunadi contends that he established eligibility for asylum. As the IJ concluded that the asylum application was untimely and no exceptions applied, we find that consideration of his asylum claim is barred. See 8 U.S.C. § 1158(a)(3)(2000).

Palgunadi also challenges the finidng that he failed to qualify for withholding of removal. "To qualify for withholding of removal, a petitioner must show that he faces a clear probability of persecution because of his race, religion, nationality, membership in a particular social group, or political opinion."Rusu v. INS, 296 F.3d 316, 324 n. 13 (4th Cir. 2002) (citing INS v. Stevic, 467 U.S. 407, 430 (1984)). Having conducted our review, we conclude that substantial evidence supports the finding thatPalgunadi did not establish eligibility for withholding of removal.

We accordingly deny the petition for review. We deny Palgunadi's motion to remand and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

*PETITION DENIED*

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

FILED
MAY 22, 2007

No. 06-1666
A72-167-696

ANDI PALGUNADI,
*Petitioner,*

v.

ALBERTO GONZALES
Attorney General,
*Respondent,*

**ORDER**

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Petitioner has filed a petition for rehearing.
The court denies the petition for rehearing
Entered for a panel composed of Judge Michael, Judge Gregory, and Judge Duncan.

For the Court,

/s/ Patricia S. Connor

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CLERK

## STATUTORY PROVISIONS INVOLVED

### INA § 245 (i)

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien Physically present in the United States—
(A) who--
(i) entered the United States without inspection; or
(ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 203(d) ) of—

(i) a petition for classification under section 204 that was filed with the Attorney General on or before April 30, 2001; or
(ii) an application for a labor certification under section 212(a)(5)(A) that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000; may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence x x x ...

(2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if-
(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and
(B) an immigrant visa is immediately available to the alien at the time the application is filed.

**INA § 240 (c) (7) Motions to reopen.**

(A) In general.-An alien may file one motion to reopen proceedings under this section , except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv) .
(B) Contents.-The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.
(C) Deadline.-
(i) In general.-Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

**28 USC § 2347. Petitions to review; proceedings**

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter are heard in the court of appeals on the record of the pleadings, evidence adduced, and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.
(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—
(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;
(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or
(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.
(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—

(1) the additional evidence is material; and
(2) there were reasonable grounds for failure to adduce the evidence before the agency;
the court may order the additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.

**PROVISIONS OF REGULATIONS INVOLVED**

**8 CFR § 245.2**

*Application* (a) General--(1) Jurisdiction. An alien who believes he or she meets the eligibility requirements of section 245 of the Act or section 1 of the Act of November 2, 1966, and Sec. 245.1 shall apply to the director having jurisdiction over his or her place of residence unless otherwise instructed in 8 CFR part 245, or by the instruction on the application form. After an alien, other than an arriving alien, is in deportation or removal proceedings, his or her application for adjustment of status under section 245 of the Act or section 1 of the Act of November 2, 1966 shall be made and considered only in those proceedings.

**8 CFR §1003.2(c)(2)**

(2) Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

No. 07-249

# In the Supreme Court of the United States

ANDI PALGUNADI, PETITIONER

*v.*

MICHAEL B. MUKASEY, ATTORNEY GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the court of appeals erred in denying petitioner's motion to remand based on evidence outside of the administrative record relating to a new claim for relief.

2. Whether the court of appeals erred in holding that substantial evidence supports the agency's determination that petitioner failed to establish eligibility for withholding of removal to Indonesia.

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# In the Supreme Court of the United States

No. 07-249

ANDI PALGUNADI, PETITIONER

*v.*

MICHAEL B. MUKASEY, ATTORNEY GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but it is available at 216 Fed. Appx. 304. The decisions of the Board of Immigration Appeals (Supp. Pet. App. 7a-8a) and the Immigration Judge (Supp. Pet. App. 9a-19a) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on February 12, 2007. A petition for rehearing was denied on May 22, 2007 (Pet. App. 3a). The petition for a writ of certiorari was filed on August 17, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. a. Section 245(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1255(i), allows certain aliens who are physically present in the United States to seek adjustment of their status to that of an alien lawfully admitted for permanent residence. Section 245(i) provides that the Attorney General "may adjust" the status of an alien who "entered the United States without inspection" if he pays a penalty and meets two other requirements:

> (A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and
>
> (B) an immigrant visa is immediately available to the alien at the time the application is filed.

8 U.S.C. 1255(i)(2). The original sunset date for Section 245(i) was extended several times and expired on April 30, 2001, except for those aliens who were already "grandfathered." 8 U.S.C. 1255(i); 8 C.F.R. 1245.10. As relevant here, a "grandfathered" alien includes an alien who had an application for a labor certification filed on his behalf on or before April 30, 2001, which was approvable when filed. 8 U.S.C. 1255(i)(1)(B)(ii); 8 C.F.R. 1245.10(a)(1)(i)(B).

An alien may seek to adjust his status under Section 1255(i), based on an employer's need for his skills, in a three-step process. *Khan* v. *Attorney General*, 448 F.3d 226, 228 n.2 (3d Cir. 2006). In "the first preliminary step," the potential employer must file a labor certification and establish, *inter alia*, that there is no United States citizen available to fill the job. *Ahmed* v. *Gonzales*, 447 F.3d 433, 438 (5th Cir. 2006). Second, once the

labor certification is approved, the prospective employer must file the approved labor certification along with an employment-based visa petition (Form I-140). See 8 C.F.R. 204.5(a). Finally, if the employment-based visa petition is approved, then the alien's application for adjustment of status may be considered for adjudication. See 8 C.F.R. 1245.2(a)(2). That process may be lengthy, and the ultimate decision regarding whether to permit adjustment of status is entrusted to the discretion of the Attorney General. *Ahmed*, 447 F.3d at 438-439 & n.3.

If an alien is in removal proceedings and wishes to seek adjustment of his status under Section 245(i), he may only do so in those proceedings. 8 C.F.R. 1245.2(a)(1)(i) ("In the case of any alien who has been placed in * * * removal proceedings * * *, the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status the alien may file."). Subject to certain exceptions, an alien may file a motion to reopen a completed removal proceeding "within 90 days of entry of a final administrative order." 8 U.S.C. 1229a(c)(7)(C)(i) (Supp. V 2005).

b. Section 242(a) of the INA, 8 U.S.C. 1252(a), generally authorizes the courts of appeals to review final orders of removal on petition for review. The reviewing court "shall decide the petition only on the administrative record on which the order of removal is based." 8 U.S.C. 1252(b)(4)(A). The court "may not order the taking of additional evidence under section 2347(c)" of Title 28. 8 U.S.C. 1252(a)(1).[1]

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[1] 28 U.S.C. 2347(c) provides that a reviewing court may grant "a party to a proceeding to review" a covered administrative order leave "to adduce additional evidence" if that evidence is "material" and "there were reasonable grounds for failure to adduce the evidence before the

c. The INA defines a "refugee" as an alien who is unwilling or unable to return to his or her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). If the "Secretary of Homeland Security or the Attorney General determines" that an alien is a refugee, he may, in his discretion, grant the alien asylum in the United States. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 101(a), 119 Stat. 303 (8 U.S.C. 1158(b)(1)(A) (Supp. V 2005)). An application for asylum generally must be filed within one year of an alien's entry into the United States. 8 U.S.C. 1158(a)(2)(B).

In addition to the discretionary relief of asylum, mandatory withholding of removal is available if "the alien's life or freedom would be threatened in [the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). An applicant for withholding of removal must establish that it is more likely than not that he would face persecution on account of a protected ground upon removal to a particular country. 8 C.F.R. 208.16(b)(2). The "more likely than not" standard is a more stringent standard than a well-founded fear of persecution (the asylum standard). *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-432 (1987).

To obtain protection under the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), Dec. 10, 1984, 1465 U.N.T.S. 85, an applicant must demonstrate,

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agency." In such circumstances, a court may order that evidence "to be taken by the agency."

*inter alia*, that it is more likely than not that he would be tortured "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" if removed to a certain country. 8 C.F.R. 1208.18(a)(1); see 8 C.F.R. 1208.16(c)(2).

The applicant bears the burden of establishing that he or she is eligible for asylum, withholding of removal, or CAT protection. 8 C.F.R. 208.13(a), 208.16(b), 1208.16(c)(2).

2. a. Petitioner is a native and citizen of Indonesia and a practicing Muslim. He arrived in the United States in November 1999 as a non-immigrant vocational student and was authorized to stay for one year. Petitioner remained in the United States long after the date permitted, and the Department of Homeland Security initiated removal proceedings. Petitioner conceded removability, but he sought relief from removal in the form of asylum, withholding of removal, and protection under the CAT. In the alternative, petitioner requested voluntary departure. Supp. Pet. App. 9a-10a.

Petitioner claimed that before he left Indonesia, he was threatened by the Islamic extremist group Jemaat Islamiah, an organization designated by the United States as a terrorist group. Petitioner testified that members of the group first began threatening him when he worked as a pilot for the Indonesian government. Petitioner explained that after his contract expired with the government, he went into business for himself, and he was threatened by "individuals who sought to extort monies from his business," who he "believed to be" Islamic extremists. Petitioner also testified regarding an incident in which he was confronted by several individuals he believed to be members of an extremist group

while he was at an automated teller machine. Supp. Pet. App. 11a-12a.

b. The immigration judge (IJ) denied petitioner's applications for asylum, withholding, and CAT protection, but he granted petitioner voluntary departure. First, the IJ denied petitioner's asylum application because petitioner had not filed the application within one year of his entry into the United States, and petitioner did not demonstrate any circumstances that would permit relief from the one-year bar. Supp. Pet. App. 12a, 16a; see 8 U.S.C. 1158(a)(2)(B).

Second, the IJ determined that petitioner had not established his eligibility for withholding of removal because he failed to establish that it was more likely than not that he would be persecuted on account of a protected ground if returned to Indonesia. Supp. Pet. App. 15a-18a. Petitioner claimed that he would be persecuted on two protected grounds, religion and membership in a particular social group (airline pilots who work for the Indonesian government). *Id.* at 17a. The IJ found that petitioner's social group claim failed because petitioner was no longer a member of the claimed group, which meant that he could not show a likelihood of persecution on that basis. *Ibid.*; see *In re Acosta*, 19 I. & N. Dec. 211, 231-233 (B.I.A. 1985), overruled on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). The IJ then found that petitioner had not established that he would be persecuted based on his religion because there was "no evidence" that petitioner had been or would be "singled out to be persecuted for [his] religious affiliation and belief." Supp. Pet. App. 17a. Indeed, the evidence revealed that petitioner was threatened "not because of [his] religion" but "because [he] worked as a pilot for the government" and "because

[he] owned a business." *Ibid.* As a result, the IJ found that there was simply "no nexus between [petitioner's] fear * * * and the protected grounds" in the INA. *Id.* at 17a-18a.

The IJ denied petitioner's claim for relief under the CAT, finding that there was no evidence that petitioner had been or would be tortured by the government, or with the acquiescence of the government, if returned to Indonesia. Supp. Pet. App. 16a-17a. Finally, the IJ granted petitioner voluntary departure in lieu of removal. *Id.* at 18a-19a.

3. The Board of Immigration Appeals (Board) affirmed the IJ's decision, "find[ing] no error in the denial of the relief sought." Supp. Pet. App. 7a. Petitioner had also filed a motion to remand before the Board, arguing that remand was warranted because he had filed an employment-based visa petition. *Id.* at 8a; see *Ahmed*, 447 F.3d at 438 n.3 (filing of employment-based visa petition is second step in seeking to adjust status based on an employer's need for skills). The Board denied petitioner's motion to remand because petitioner's visa petition had not yet been adjudicated, and thus he had not met the prerequisites to seek an adjustment of status. Supp. Pet. App. 8a.; see 8 U.S.C. 1255(i)(2)(B).

In accordance with the IJ's order, the Board provided petitioner 60 days voluntarily to depart the United States. Supp. Pet. App. 8a. Petitioner then requested a stay of removal and a stay of voluntary departure pending review from the court of appeals. The government did not oppose petitioner's motion for a stay of removal, but it did oppose his motion for stay of voluntary departure. The court of appeals granted petitioner a stay of removal only but denied a stay of voluntary departure. See 06-1666 Docket entry (4th Cir. July 26,

2006); see also *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 193-195 (4th Cir. 2004) (holding that the court of appeals lacks the authority to stay voluntary departure). Petitioner has not voluntarily departed the United States.

4. In an unpublished, per curiam opinion, the court of appeals denied petitioner's petition for review. Pet. App. 1a-2a. It first determined that it could not consider petitioner's asylum application because the IJ had determined it was time-barred. *Id.* at 2a; see 8 U.S.C. 1158(a)(3).[2] The court then rejected petitioner's withholding argument, holding that "substantial evidence support[ed] the finding that [petitioner] did not establish eligibility for withholding of removal." Pet. App. 2a.

Petitioner had also filed a motion to remand with the court of appeals. Petitioner argued that the court should remand his case to the Board so that he could file an application for adjustment of status because his work visa (*i.e.*, I-140 petition) had been approved. See Pet. Motion to Remand 1-2 (filed Nov. 30, 2006). The government opposed the motion, explaining that remand was inappropriate because the court of appeals' review was limited to the administrative record on which the petition was based and that petitioner's remedy was to file a motion to reopen with the Board. See Gov't Opp. to Motion to Remand 3-4 (filed Dec. 8, 2006). The court of appeals denied petitioner's motion to remand. Pet. App. 2a.

## ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this

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[2] Petitioner does not challenge the denial of his asylum claim or the denial of his CAT claim before this Court.

Court or any other court of appeals. Further review of petitioner's fact-bound claims is therefore unwarranted.

1. Petitioner contends (Pet. 5-9) that the court of appeals erred by denying his motion to remand to the Board for consideration of his application for adjustment of status based on new evidence of an approved work visa. Petitioner does not contend that there is any disagreement in the circuits on this point, and he has no colorable claim that the decision below conflicts with a decision of this Court or presents an issue of such extraordinary importance that this Court's review is warranted. See Sup. Ct. R. 10. In any event, the decision below is correct.

a. Regulations implementing the INA make clear that an alien who has been placed in removal proceedings may seek adjustment of his status only in those proceedings. 8 C.F.R. 1245.2(a)(1). Petitioner acknowledges that limitation on the availability of Section 245(i) relief. Pet. 7-8. Moreover, the court of appeals' authority to review a final order of removal is limited to the administrative record on which the order of removal was based. 8 U.S.C. 1252(b)(4)(A). Petitioner's motion to remand was based on new evidence that was not part of the administrative record, *i.e.*, approval of petitioner's work visa. Pet. 6. The court of appeals thus correctly determined that remand was inappropriate.

Petitioner contends (Pet. 8) that under those circumstances, the court of appeals could have remanded the case to the Board for further proceedings under 28 U.S.C. 2347(b) or (c). That contention lacks merit. First, 28 U.S.C. 2347(b) is not applicable to this case because petitioner is not seeking review of an agency action taken without a hearing. 28 U.S.C. 2347(b) (authorizing remand when, *inter alia*, "the agency has not

held a hearing before taking the action of which review is sought by the petition"). Indeed, petitioner was provided with a hearing on his claims for relief from removal, which formed the basis of his petition for review. What petitioner is seeking is an additional hearing on a claim that has not been presented or considered by the agency, specifically, whether he should be granted adjustment of status based on his approved visa petition, and that type of claim is not a basis for remand under 28 U.S.C. 2347(b).

Second, remand under 28 U.S.C. 2347(c) is expressly barred by 8 U.S.C. 1252(a), which defines the limits of the courts of appeals' authority to review final orders of removal. See 8 U.S.C. 1252(a)(1) ("[T]he court may not order the taking of additional evidence under section 2347(c)" of Title 28.); see also, *e.g.*, *Lendo* v. *Gonzales*, 493 F.3d 439, 443 n.3 (4th Cir. 2007) (court of appeals is barred under 8 U.S.C. 1252(a)(1) from remanding based on intervening developments); *Gebremaria* v. *Ashcroft*, 378 F.3d 734, 737 (8th Cir. 2004) (statute's "prohibition of remanding for the consideration of additional evidence pertains to non-record evidence that is introduced in the first instance before a reviewing court"); *Al Najjar* v. *Ashcroft*, 257 F.3d 1262, 1281 (11th Cir. 2001) (statute "prohibits [the court of appeals] from ordering the [Board] to consider evidence that is offered for the first time on appeal, even if such material satisfies the rigors of § 1237(c)"); *Altawil* v. *INS*, 179 F.3d 791, 793 (9th Cir. 1999) (denying remand motion because court of appeals "cannot order the taking of additional evidence by the Board under 28 U.S.C. 2347(c)").

Although one circuit court has suggested that it may have "inherent power to remand for additional fact-finding in agency cases that present extraordinary and com-

pelling circumstances," it concluded that "the exercise of such an inherent power is not warranted if * * * [i] the basis for the remand is an instruction to consider documentary evidence that was not in the record before the [Board]; and [ii] the agency regulations set forth procedures to reopen a case before the [Board] for the taking of additional evidence." *Xiao Xing Ni* v. *Gonzales*, 494 F.3d 260, 269 (2d Cir. 2007). That is precisely the situation here. Petitioner sought a remand so that the Board could consider evidence that was not part of the administrative record below, and there are procedures for petitioner to seek reopening before the Board to consider his additional evidence. Specifically, petitioner may file a motion to reopen based on his approved visa petition with the Board. See 8 U.S.C. 1229a(c)(7) (Supp. V 2005); 8 C.F.R. 1003.2(c)(2). Although petitioner's motion may be time-barred, Pet. 7; 8 C.F.R. 1003.2(c)(2), the Board has the authority to reopen his case *sua sponte*, 8 C.F.R. 1003.2(a), and petitioner also could avoid the time bar by obtaining the government's agreement to join his motion to reopen, 8 C.F.R. 1003.2(c)(3)(iii).[3]

b. Petitioner contends (Pet. 7-8) that the court of appeals' refusal to grant his remand motion violates due process, because "the law confers upon [him] the right

[3] Petitioner also argues (Pet. 7) that it would be contrary to Congress's intent in enacting Section 245(i) to "le[ave] [him] without any venue where his adjustment of status could be heard." That claim lacks merit. Petitioner does not point to any language in Section 245(i) where Congress evidenced an intent to allow discretionary applications for adjustment of status to be evaluated at any time, even after a final removal order has been entered, and there is none. Moreover, Congress specifically provided a mechanism for consideration of new evidence before the agency—namely, a motion to reopen. See 8 U.S.C. 1229a(c)(7).

to apply for adjustment, [and] he cannot be deprived thereof without running afoul of the due process clause of the constitution." That claim lacks merit. As petitioner acknowledges (Pet. 8), adjustment of status is wholly within the Attorney General's discretion, see 8 U.S.C. 1255(i), and thus petitioner cannot have a protected liberty or property interest in it. See *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972) (to have a protectable property or liberty interest in a benefit, one must have "more than a unilateral expectation of it"; "[h]e must, instead, have a legitimate claim of entitlement to it").

Indeed, the courts of appeals have uniformly held that an alien has no liberty or property interest in discretionary relief, such as adjustment of status. See *Sarr* v. *Gonzales*, 485 F.3d 354, 362 (6th Cir. 2007) (finding no due process denial in failure to remand for consideration of adjustment of status because that relief is entrusted to the Attorney General's discretion); *Dekoladenu* v. *Gonzales*, 459 F.3d 500, 508 (4th Cir. 2006) (alien has "neither a liberty nor a property interest in adjustment of status"); *DaCosta* v. *Gonzales*, 449 F.3d 45, 50 (1st Cir. 2006) ("A due process claim requires that a cognizable liberty or property interest be at stake * * *. Because adjustment of status is a discretionary form of relief, it does not rise to the level of such a protected interest."); *Ahmed* v. *Gonzales*, 447 F.3d 433, 440 (5th Cir. 2006) ("This circuit has repeatedly held that discretionary relief from removal, including an application for an adjustment of status, is not a liberty or property right that requires due process protection."); *Hamdan* v. *Gonzales*, 425 F.3d 1051, 1060-1061 (7th Cir. 2005) ("[A]n alien's right to due process does not extend to proceedings that provide only discretionary relief, and

the denial of such relief does not violate due process."); *Jamieson* v. *Gonzales*, 424 F.3d 765, 768 (8th Cir. 2005) ("Because Jamieson is seeking the discretionary relief of adjustment of status, there is no constitutionally-protected liberty interest at stake."); *United States* v. *Torres*, 383 F.3d 92, 104 (3d Cir. 2004) (Section 212(c) relief implicates no liberty interest because it is "entirely a piece of legislative grace"); *Tovar-Landin* v. *Ashcroft*, 361 F.3d 1164, 1167 (9th Cir. 2004) ("[A]liens have no fundamental right to discretionary relief from removal for purposes of due process and equal protection."); *Tefel* v. *Reno*, 180 F.3d 1286, 1300 (11th Cir. 1999) ("[A] constitutionally protected interest cannot arise from relief that the executive exercises unfettered discretion to award."), cert. denied, 530 U.S. 1228 (2000); *Ahmetovic* v. *INS*, 62 F.3d 48, 53 (2d Cir. 1995) (finding "no statutory entitlement to asylum that would give rise to a due process claim"); *Velasco-Gutierrez* v. *Crossland*, 732 F.2d 792, 798 (10th Cir. 1984) (no liberty interest in discretionary deferred action). Thus, because petitioner has no protected liberty or property interest in the discretionary relief of adjustment of status, he "cannot establish that [he] had a right to due process in the proceedings to obtain this relief." *Garcia-Mateo* v. *Keisler*, No. 06-3647, 2007 WL 2873665, at *3 (8th Cir. Oct. 4, 2007).

Further, not only does petitioner lack any due process-protected right to discretionary adjustment of status, he also lacks any due process right to the process of applying for that relief itself. See *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S. 272, 280 n.2 (1998) (holding that asserting a mere protected interest in a process itself is not a cognizable claim); *Olim* v. *Wakinekona*, 461 U.S. 238, 250 n.12 (1983) (an "expectation of receiv-

ing process is not, without more, a liberty interest protected by the Due Process Clause"); *Kovats* v. *Rutgers*, 822 F.2d 1303, 1314 (3d Cir. 1987) ("[P]romises of specific procedures do not create interests protected by the Due Process clause."), cert. denied, 489 U.S. 1014 (1989). A contrary rule would make little sense, because "[i]f a right to a hearing is a liberty interest, . . . then one has interpreted [due process] to mean that the state may not deprive a person of a hearing without providing him with a hearing." *Shvartsman* v. *Apfel*, 138 F.3d 1196, 1200 (7th Cir. 1998) (internal quotation marks and citations omitted).

Indeed, the courts of appeals have routinely rejected the argument that an alien seeking discretionary relief has a liberty or property interest in the process itself. See, *e.g.*, *Cevilla* v. *Gonzales*, 446 F.3d 658, 662 (7th Cir. 2006) (finding no liberty interest in cancellation of removal, even if all statutory requirements are satisfied, because "[a] procedural entitlement is not a liberty interest"); *Nguyen* v. *District Director, Bureau of Immigration & Customs Enforcement*, 400 F.3d 255, 259 (5th Cir. 2005) (rejecting argument that an alien has a due process right to a hearing on discretionary relief); *Torres*, 383 F.3d at 104 (no liberty interest in being considered for Section 212(c) relief); *Tefel*, 180 F.3d at 1300-1301 ("[J]ust as [aliens] enjoy no 'liberty or property' interest in their expectancy of receiving suspension of deportation, they enjoy no 'liberty or property' interest in being eligible to be considered for suspension.").[4]

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[4] Although petitioner cites several cases providing circumstances in which aliens have a due process right to a hearing (Pet. 7-8), none of them holds that an alien has a protected liberty or property interest in *discretionary* adjustment of status or any procedure for obtaining that relief.

c. Even if petitioner's claim that the court of appeals should have remanded his case had merit, this case would be an inappropriate vehicle for addressing it, because petitioner's failure to voluntarily depart means that he can no longer obtain adjustment of status. Before the administrative agency, petitioner requested and was granted 60 days to voluntarily depart the United States in lieu of removal. Supp. Pet. App. 7a-8a, 10a, 18a-19a. Petitioner was also specifically notified of the consequences of failing to comply with his voluntary departure order. *Id.* at 8a. Nonetheless, petitioner failed to depart within the 60 days allowed by the agency.[5] Therefore, petitioner is statutorily ineligible for adjustment of status. 8 U.S.C. 1229c(d)(1)(B) (Supp. V 2005) ("[i]f an alien is permitted to depart voluntarily * * * and fails voluntarily to depart * * * within the time period specified, the alien," *inter alia*, "shall be ineligible for a period of 10 years" to receive certain forms of discretionary relief, including adjustment of status); see 8 C.F.R. 1240.26(a); *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004) ("Congress provided for certain penalties to attach when an alien overstays his voluntary departure period."). Further review of petitioner's claim is therefore unwarranted.

2. Petitioner contends (Pet. 9-10) that the court of appeals erred in failing to find that he demonstrated past persecution for purposes of establishing entitle-

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[5] Petitioner requested a stay of his voluntary departure period in the court of appeals, but that request was denied. See pp. 7-8, *supra*. There is no evidence that petitioner took steps to extend or otherwise prevent the expiration of his voluntary departure period, and he provides no explanation in his petition for his failure to voluntarily depart. Accordingly, petitioner's voluntary departure period expired on July 14, 2006. See Supp. Pet. App. 8a.

ment to withholding of removal. Petitioner does not assert that the decision below conflicts with any decision of this Court or any other court of appeals on this issue; he simply invokes (Pet. 9) this Court's supervisory power without providing any explanation why exercise of that power would be appropriate to review his claim. See Sup. Ct. R. 10; see also, *e.g.*, *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 ("Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals.").

In any event, the court of appeals' decision is correct. The IJ reviewed the evidence petitioner presented and concluded that he failed to demonstrate that his past experiences in Indonesia were on account of a statutorily protected ground, which is dispositive of his claim for withholding of removal. Supp. Pet. App. 15a-18a; see 8 U.S.C. 1231(b)(3)(A) (persecution must be "because of" a protected ground); see also, *e.g.*, *In re J-B-N- & S-M-*, 24 I. & N. Dec. 208, 211 (B.I.A. 2007) ("[A]n applicant must produce evidence, either direct or circumstantial, from which it is reasonable to believe that the harm was or would be motivated in part by an actual or imputed protected ground."). The Board agreed with the IJ's finding, Supp. Pet. App. 7a, and the court of appeals determined that "substantial evidence support[ed] th[at] finding." Pet. App. 2a. Petitioner does not challenge the court's finding that substantial evidence supported the agency's conclusion that he failed to demonstrate a nexus between the alleged persecution and a protected group, nor could he. Supp. Pet. App. 17a. Petitioner therefore did not establish eligibility for withholding of removal.

Petitioner contends (Pet. 9) that the IJ refused to consider his evidence of past persecution for purposes of withholding of removal because the IJ found that his asylum claim was time-barred. Petitioner is mistaken. The IJ's decision makes clear that, independent of his asylum holding, the IJ carefully reviewed petitioner's evidence and determined that he had not established a nexus between any persecution and a protected ground. See Supp. Pet. App. 17a-18a (finding "no nexus between [petitioner's] fear * * * and the protected grounds under our law"). As a result, the IJ was not required to consider whether what had happened to petitioner rose to the level of "persecution." The court of appeals thus correctly held that petitioner is not eligible for withholding of removal, and no further review of that claim is warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
**Supreme Court of the United States**

ANDI PALGUNADI,
*Petitioner,*

v.

ALBERTO R. GONZALES,
UNITED STATES ATTORNEY GENERAL
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

# SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Decision of the Board of Immigration Appeals

**U.S. Department of Justice**
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A72 167 696 – Baltimore Date: May 15, 2006

In re: ANDI PALGUNADI

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Arnedo S. Valera, Esquire

ON BEHALF OF DHS: Billy J. Sapp, Assistant Chief Counsel

In a decision dated January 31, 2005, an Immigration Judge denied the respondent's applications for asylum, withholding of removal, and relief pursuant to the Convention Against Torture. The respondent was ordered removed to Indonesia, should he fail to avail himself of voluntary departure. The appealed the Immigration Judge's decision. The appeal will be dismissed.

We affirm the decision of the Immigration Judge and find no error in the denial of the relief sought. *See Matter of Burbano,* 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision").

The motion to remand is denied. A 3rd preference employment-based visa petition (skilled worker) was filed on the respondent's behalf on December 19, 2005 and it has yet to be adjudicated. In circumstances such as these, we decline to remand cases on the basis of an unadjudicated work visa.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted voluntarily to depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS). See section 240 (B)(b) of the Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails so to depart, he shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the DHS, he shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. See section 240B(d) of the Act.

(Signed)

Anthony C. Moscato

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Baltimore, Maryland

File A 72 167 696 January 31, 2005

In the Matter of

ANDI PALGUNADI,
Respondent

CHARGE: Section 237(a) (1) (B) of the Immigration and Nationality Act, a nonimmigrant overstay

APPLCATIONS: Section 208 of the Immigration and Nationality Act, withholding of removal; Article 3 Convention Against Torture withholding of removal; alternatively Section 240B of the Immigration and Nationality Act, voluntary Departure

ON BEHALF OF RESPONDENT: ON BEHALF OF DHS:

Arnedo Valera, Esquire Billy Sapp
Assistant District Counsel

BENCH DECISION AND ORDER OF THEIMMIGRATION JUDGE

The respondent has appeared before the United States Immigration Court at Baltimore, Maryland, this date, and has presented his applications for relief from removal and deportation. Those applications include an application of asylum under Section 208 of the Immigration and Nationality Act, withholding of removal under Section 241(b)(3) of the

Immigration and Nationality Act, protection under the Convention Against Torture Article 3 withholding of removal, and in the alternative, voluntary departure under Section 240B of the Immigration and Nationality Act.

Those applications have now been duly considered by the Court and all testimony and all evidence that has been received into this record has been considered, even if not specifically discussed below. The decision and order of this Court follows.

## STATEMENT OF THE CASE

The respondent is a native and a citizen of the country of Indonesia. He arrived in the United States at Detroit, Michigan on November 1, 1999, as a nonimmigrant vocational or non-academic student with authorization to remain in the United States for a period of time not to exceed October 31, 2000. The respondent has testified that he specifically came to the United States for the purposes of renewing his air pilot license.

The respondent remained in the United States beyond the date permitted to him, and has continued to remain in the United States beyond October 31, 2000 in violation of the United States immigration law without permission to remain.

The respondent does not dispute the factual allegations within the Notice to Appear and has conceded to the charge of removability. Based upon those admissions, the Court has found that he is subject to being removed and deported to his country, Indonesia.

The respondent never filed an application for asylum or withholding of removal after his arrival in the United States. But only raised this as a defense in pleading proceedings before the Court in December of 2003. The

application is a defensive application, as it has been filed with the Court. The Court sought a State Department advisory opinion in accordance with the regulations and the State Department responded by referring the Court to the current Country Report on Human Rights Practices for Indonesia. The Court has reviewed that report and it is made a part of this record.

TESTIMONY AND EVIDENCE PRESENTED

The respondent claims that in addition to coming to the United States to renew his pilot's license, he also came in the hopes of staying here permanently. He told the court that he and his family could not live peacefully in Indonesia. He advised the Court that as a Muslim and a member of an Islamic religion in his country, the Islamic extremists had threatened him and threatened his wife.

As a pilot for the government of Indonesia, flying high ranking officials, the respondent testified to the court of incidents of threats against employees, in particular, pilot and crew persons. The respondent's spouse, who gave witness in this case, confirmed and corroborated that, as she too was a member of the airline crew.

The respondent claims that after his contract expired with the government as a pilot, he decided not to continue to work because he believed that the work was dangerous. He then went into business for himself, and while in business for himself, he testified of incidences of threats by individuals who sought to extort monies from his business. The individuals also were believed to be part of the Islamic extremists of his country.

Specifically, the respondent advised the Court that he was fearful for his well-being and the well-being of his family from the Jemaat Islamiah. This organization along with the

Islam Jama-ah, are extremist organizations that have created havoc and violence against others in Indonesia. In fact, the Jemaat Islamiah is a prescribed organization on the United States' list of prescription groups and organizations, terrorist groups and organizations.

In his testimony and affidavit, the respondent mentions a few incidences other than the threats and extortion from his business and the danger of flying for the government. He gave an accounting in his affidavit and his testimony of an incident that occurred at an ATM machine, and how there was a confrontation with several individuals, who the respondent believed were a part of this extremist group.

The respondent recognizes that he did not file a timely asylum application. However, in general argument, it is his request that an exception be made that the asylum application be adjudicated along with other applications.

In support of his application, the respondent presents to the Court his application, his personal statement, biographical information, a copy of his passport and arrival document, and general background information. In addition, he has provided to the Court evidence of his employment and his wife's employment for the airline, and also has provided to the Court his testimony and the proffered testimony of his spouse. See respondent's Group Exhibit A, sub-exhibits A1 through A7.

The Court has summarized the claim presented. However, for purposes of disposition, it incorporates as part of the respondent's testimony, his affidavit as found at Group Exhibit A, sub-exhibit A3. The affidavit will not be read into the record.

The respondent argues that he is a refugee from his country, entitled to asylum, withholding of removal. He has also made a general argument that not withstanding the fact that his claim of feared persecution is not at the hands of the government, that he may be considered for protection under the Convention Against Torture.

Alternatively, the respondent has requested voluntary departure.

The Department of Homeland Security opposes the applications for asylum, withholding of removal, protection under the Convention Against Torture. Firstly, the Department argues the respondent is time barred from asylum. Secondly, the Government argues that the respondent has failed to meet his burden of proof, has failed to establish a nexus between his fear of an Islamic extremist group and a protected ground.

The protected grounds advanced by the respondent are religion, membership in a particular social group.

## STATEMENT OF THE LAW

For the respondent to be granted asylum in the United States, he must meet the legal definition of refugee found at Section 101(a)(42)(A) of the Act. His evidence must establish past persecution and/or a well-founded fear of future persecution on account of a protected ground. There must be a nexus between the feared persecution and the protected ground.

In this case, as noted, the protected grounds are religion and membership in a particular social group. In determining whether or not an individual meets his burden of proof, the Court looks at the country at issue and its human rights record. It applies a reasonable person standard, giving

due consideration to subjective fears that are expressed, provided they are genuine and supported by objective facts.

Individuals who have been subjected to past persecution are deemed to have a well-founded fear of future persecution absent changed circumstance. Protection under Section 241(b)(3) of the Act, to-wit: withholding of removal, enhances the burden of proof of the respondent. No longer is it sufficient to establish a well-founded fear of being persecuted. now the respondent must show that persecution more than likely will occur. The evidence must show a clear probability that the persecution on account of a protected ground most likely will occur. That his life and his freedom will be placed in danger if he is required to return to his homeland.

Likewise, protection under the Convention Against Torture, Article 3 withholding of removal, requires that the respondent show that it is more likely than not that if he returns to his country, he will be subject to torture within the meaning of that term And torture is defined at Article 1 of the Convention Against Torture and also at 8 C.F.R. 208.18(a)(1). The torture must come at the hands of the government.

In this case, the tortured would come from the Indonesian government. The respondent, of course, has not indicated in his written record or his testimony that he fears, the government. To the contrary, the respondent worked for the government of Indonesia. Torture continues to be defined also that the torture is inflicted by, or at the instigation of, or with the consent or acquiescence of a public official or other persons acting in an official capacity. Thus, there must exist a knowing acquiescence and not and does not cover groups or organizations that the government is unable to control.

This court has examined all of the testimony in evidence, consistent with case law, our regulations and of course our statute.

And the cases the Court has examined the testimony and evidence under, include the cases of Stevic, 1984 the Suprem Court; Cardoza-Fonseca, 1987 the Supreme Court; Elias-Zacarias 1992, the Supreme Court. The cases of Aragic and Ennin 1998, Fourth Circuit Court of Appeals precedent decisions, which include the following, Matter of Acosta, Matter of Mogharrabi, Matter of Dass, Matter of S-M-J-, Matter of M-M-A, Matter of S-V-, Matter of J-E-, and cases cited therein.

## FINDINGS OF THE COURT

After careful review of the testimony and evidence, the Court decides as follows. The Court addresses its findings directly to the respondent and his family.

Mr. Palgunadi, I am satisfied that you and your wife and your family came here for a better life, so that you did not have to live in the uncertainties of your own nation. I am satisfied you came here with the hope and the opportunity to live peacefully and to live freely and to provide a better life for your family, in particular, your children. I am also satisfied that you and your family are good people, and I am sympathetic to your plight. But sympathy is not the test of eligibility for the relief that you seek before this Court.

You are not a refugee within the meaning of our statute, and therefore, you cannot be protected under the refugee laws of the United States. Indonesia, as a nation, is no on trial before this court, and the difficulties that the Indonesian government has with Islam extremists is not on trial before the Court.

The issue before the Court s whether or not you are truly a refugee within the meaning of that term, and as envisioned by our law, and you are not. You are not because you do not satisfy the statutory or regulatory requirements of the law. Nor does you case fit within the cases of precedence that I have referenced.

Firstly, you did not make an application for asylum timely under the law. The law is clear. An application for asylum must be made within a year of the arrival of the individual. Your application was filed many, many yards after your arrival in the United States. Secondly, the law says you maybe entitled to an exception, and the exception would be change circumstance or extraordinary circumstance. There are no extraordinary circumstance. I am aware form your attorney that you were seeking to legalize your status in the United States under a sponsorship of employment. But that does not excuse the application being filed within a year.

Nor are there changed circumstances in your case. The reasons that you apply for asylum today before the Court, are the same reasons for coming to the United States in 11999, among others.

So there is no exception and because there is no exception, your application is time barred, and this Court cannot consider your asylum request.

Your application for withholding of removal under the Convention Against Torture fails because you do not fear your government. There is no evidence that your government would torture you. In fact, you worked for your government and in fact you went to your government when there was an incident of extortion against you. You reported the incident to the police. Nor has the government acquiesced with any public official or these organization. In fact, the government

seeks to bring to justice these extremist organizations that cause violence and intimidation and ruthless acts against it.

The withholding of removal application under Section 241(b)(3) also fails, because there is no evidence in this record that it is more likely than not that if you returned to your country, your life and freedom will be placed in danger on account of your religion or your membership in a particular social group.

If the social group is an airline pilot for the government, you no longer posses that immutable characteristic. In fact, you found the job too dangerous and left it. This is exactly the ruling in Matter of Acosta. If your membership in a particular social group is that you are a member of a Muslim set, that is confronted by the extremist, this does not satisfy the legal test either. Because there is no evidence to show the Court that you were singled out to be persecuted for your religious affiliation and belief. You were threatened, not because of your religion, but because you worked as a pilot for the government. You were extorted because you owned a business and these individuals sought to take some of your monies.

The law requires that the Court review, not the opinion or the religion or the membership of the persecutor, but rather that of the victim, and there is nothing in this record to indicate that you have ever been targeted or singled out because of how you are, because of what your religious belief is, because of what your past employment may have been.

Regrettably, these are unfortunate incidences and in most, if not all cases, criminal instances that have occurred that have scarred you and your wife and your children, to the point where you did not feel completely safe in your country. But the evidence does not meet your required burden of proof, because there is no nexus between your fear, which I

believe to be genuine and the protected grounds under our law.

Your case fails under the Supreme Court decisions that I have mentioned above. It also fails under the fourth Circuit Court of Appeals precedent decisions regarding burden of proof that I have mentioned above, and it also fails under the legal tests of the Board of Immigration Appeals cases that I have addressed as well.

Mr. Palgunadi, I find that in the instant case, you are not a refugee within the meaning of that term, that you have not made an application timely, that there is no evidence of past persecution and/or a well-founded fear of future persecution on account of a protected ground. I also find for the reasons that I have stated that your application is not proper under the Convention Against Torture, and the intent of that convention and our obligation to that convention.

These applications, therefore, must be denied.

I also find that you satisfy the legal requirements of voluntary departure, both as a matter of law and as a matter of discretion and that application will be approved.

## COURT ORDERS

It is this 31st day of January 2005, by the United States Immigration Court jurisdiction Baltimore, Maryland ordered that the applications for asylum under Section 208 of the Immigration and Nationality Act, withholding of removal under Section 241(b)(3) of the Immigration and Nationality Act, protection under the convention Against Torture withholding of removal be, and are herein denied.

That the application for voluntary departure under Section 240B of the Immigration and Nationality Act be, and

is herein granted, on or before 1 April 2005, upon posting a departure bond in the amount of $500 on or before February 7, 2005. If the voluntary departure conditions of this order are violated, without further notice and/or proceedings, the respondent shall be removed and deported to his country, Indonesia.

JOHN F. GOSSART, JR.
Immigration Judge